RONALD T. WELCH ET AL.
v.
AREA DIRECTOR, MINNEAPOLIS AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 88-14-A Decided July 22, 1988

Appeal from a decision of the Minneapolis Area Director, Bureau of Indian Affairs, approving a general counsel contract.

Decision set aside; referred for evidentiary hearing and recommended decision.

1. Administrative Procedure: Generally--Indians: Attorneys: Contracts--Rules of Practice: Generally

   Under 25 CFR 88.1(c), a decision of a Bureau of Indian Affairs Area Director approving, disapproving, or conditionally approving an attorney's contract is final for purposes of judicial review.

2. Board of Indian Appeals: Jurisdiction

   When an appeal is referred to the Board of Indian Appeals by the Washington office of the Bureau of Indian Affairs, that referral includes the authority to decide the issues raised.

3. Board of Indian Appeals: Jurisdiction--Indians: Enrollment/Tribal Membership

   Unless the Department of the Interior is otherwise given authority to review questions of tribal membership, tribes conclusively determine membership for those purposes over which they have complete control. However, when Departmental action is authorized based upon questions of tribal membership, the Department has authority to consider enrollment questions.

4. Evidence: Presumptions

   The presumption of the regularity of official actions will stand unless evidence contradicting it is presented.

5. Administrative Procedure: Hearings--Indians: Enrollment/Tribal Membership

A case before the Board of Indian Appeals which raises a genuine issue of material fact or facts will be referred for an evidentiary hearing and recommended decision in accordance with 43 CFR 4.337(a).

APPEARANCES: James E. Townsend, Esq., Minneapolis, Minnesota, for appellants; Ronald C. Hall, Esq., Boulder, Colorado, for intervenor Fredericks & Pelcyger.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

By memorandum dated January 25, 1988, the Acting Deputy to the Assistant Secretary--Indian Affairs (Tribal Services) referred this appeal to the Board of Indian Appeals (Board) pursuant to 25 CFR 2.19(a)(2). 1/ Appellants Ronald T. Welch, et al., 2/ sought review of an October 1, 1987, decision of the Minneapolis Area Director, Bureau of Indian Affairs (BIA; appellee), approving general counsel contract #F50C14207A34 between the Shakopee Mdewakanton Sioux Community (tribe) and the law firm of Fredericks & Pelcyger, Boulder, Colorado (intervenor). For the reasons discussed below, the Board sets aside appellee's decision and refers this matter to the Hearings Division of the Office of Hearings and Appeals for an evidentiary hearing and recommended decision by an Administrative Law Judge (Departmental).

Background

On May 12, 1987, a general council meeting of the tribe was held. Susan Totenhagen chaired that meeting. 3/ According to appellants, the

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1/ 25 CFR 2.19 states in pertinent part:

"Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or Bureau of Indian Affairs official exercising the administrative review authority of the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision."

2/ Welch filed a notice of appeal on his own behalf. A separate petition appealing the decision was filed with the Washington office of the BIA by Leonard Prescott, James K. Welch, Kathy Welch, Cecelia Stout, Winifred S. Feezor, Patricia Hove, Rose B. Prescott, Jay C. Hove, Ronnie A. Brooks, Cynthia L. Soule, Vincent E. Rose, Robert M. Prescott, Alan Prescott, and Mary M. Brooks. A notice of appeal was also filed by James E. Townsend, Esq. It is unclear whether Townsend's notice was filed on his own behalf or on behalf of several of the individuals who also signed the petition to the Washington BIA office.

3/ Totenhagen was the chairman of the tribe in early 1986. A removal action was instituted against her in March 1986. The removal was effected by the tribe and approved by appellee on Apr. 9, 1986. On appeal, this

meeting was illegal because approximately 15 people, including themselves, were not given proper notice of the meeting and, when they arrived at the meeting despite not receiving proper notice, were denied the right to vote. These individuals subsequently left the meeting. Appellants further allege that after these individuals left, Totenhagen presented Resolution #5-12-87-003 to retain intervenor as general counsel for the tribe. The resolution passed and was presented to appellee for approval.

By letter dated July 1, 1987, appellee informed Totenhagen that the contract was disapproved in accordance with an April 24, 1987, decision of the Assistant Secretary--Indian Affairs. 4/ Appellee stated that if additional information was presented showing that the May 12 meeting was valid, the resolution could be resubmitted.

On September 23, 1987, Totenhagen and the tribe's Secretary-Treasurer, Amy Stade, met with members of appellee's staff and offered additional evidence concerning the validity of the May 12 meeting. That evidence apparently consisted of the minutes of the May 12 meeting; a notarized certificate of service by Totenhagen, dated May 8, 1987; and statements from

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fn. 3 (continued)
Board determined that Totenhagen had not been given the notice concerning her removal hearing to which she was entitled under the tribe's removal ordinance. Totenhagen v. Minneapolis Area Director, 15 IBIA 105, recon. denied, 15 IBIA 121 and 15 IBIA 123 (1987). Leonard Prescott (Prescott), then Vice-Chairman of the tribe, appealed the Board's decision to Federal district court. The court reversed the Board's conclusion, holding that notice was adequate, and remanded the case to the Board. Prescott v. Hodel, Civil No. 4-87-106 (D. Minn. July 10, 1987). On remand, the Board began with the court's conclusion that notice was adequate, and held that under those circumstances, Totenhagen had not exercised her tribal right to present a defense at her removal hearing. Accordingly, the appeal was dismissed for failure to exhaust tribal remedies. Totenhagen v. Minneapolis Area Director, 16 IBIA 9 (1987).

Totenhagen was, therefore, recognized as chairman of the tribe from Feb. 12 through Nov. 25, 1987, under the Board's decision.

4/ The Apr. 24, 1987, decision was issued pursuant to a Mar. 9, 1987, agreement with the Federal district court that the Department would expeditiously decide any pending Shakopee disenrollment petitions. The Assistant Secretary noted that the tribe's proper use of its established enrollment and disenrollment procedures "would be consistent with the principles of tribal sovereignty and self-determination" and "would be far preferable to the present practice of asking the BIA to sift through boxes of paper so it can report back to the tribe the BIA's best guess as to what the tribe has done" (Decision at 3). The Assistant Secretary held, however, that the tribe had failed to follow its own disenrollment procedures when it attempted to disenroll ten individuals and that those individuals were not given notice of a Feb. 28, 1987, general council meeting. Consequently, he held that he could not recognize actions taken at that meeting.

Totenhagen and Stade. 5/ This initial meeting was apparently followed by additional meetings on September 25 and 27, 1987.

After reviewing this material, the Department's Field Solicitor in Twin Cities, Minnesota, advised appellee that the additional evidence submitted was sufficient to show the meeting was valid, and that appellee could approve the contract. 6/ Accordingly, appellee approved the contract, without further comment, on October 1, 1987.

While these events were occurring, suit was pending in Federal district court in an action by the tribe against the companies which had formerly held tribal bingo management contracts. United States of America ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co., et al., No. 4-85-231 (D. Minn.). On August 19, 1987, the Federal magistrate handling the case issued an order to BIA to show cause why he should not order BIA either to approve an attorney contract for the purposes of conducting the case before him or to provide representation to the tribe from the Justice Department.

By letter dated August 20, 1987, appellee suggested a general council meeting jointly called by the two factions of the tribe for the express purpose of choosing an attorney to represent the tribe in the lawsuit. Appellee further suggested that a BIA representative be present at the meeting in order to be able to assure appellee that the meeting was properly conducted so that the choice of attorney could be approved.

The record contains assertions by Townsend that Prescott agreed to such a meeting, but that Totenhagen refused to participate. There is no evidence that a meeting was ever called. Appellee's October 1 approval of the present attorney contract foreclosed any additional possibility for such a meeting.

The notices of appeal in this case are each dated October 2, 1987. The appeals were treated together by the Washington office of BIA. Statements of the parties' positions were filed with BIA. By memorandum dated January 25, 1988, the appeals were transferred to the Board pursuant to 25 CFR 2.19(a)(2). Appellants and intervenor filed additional briefs with the Board.

5/ Not all of these materials are part of the administrative record.

6/ In making this determination, the Field Solicitor's office noted that several people did leave the meeting, but that Totenhagen specifically stated for the record that those people were not being restricted from voting. The Field Solicitor's memorandum to appellee states at page 2: "Although we have concerns about this aspect of the meeting, we believe that if we give effect to the presumption of validity respecting Community affairs, we may conclude that the meeting was valid."

Jurisdictional Determination

Intervenor argues that under 25 CFR 88.1(c) the Board lacks jurisdiction to hear this appeal. Section 88.1(c) states: "Any action of the authorized representative of the Secretary of the Interior which approves, disapproves or conditionally approves a contract pursuant to paragraph (a) or (b) of this section shall be final." Paragraph (a) concerns employment of counsel by tribes organized under the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-479 (1982); paragraph (b) concerns employment of counsel by tribes not organized under the IRA. Intervenor thus argues that appellee's decision is final and cannot be reviewed within the Department.

It is obvious from the posture of this case that neither appellee nor the Department considered that appellee's decision was not subject to further review within the Department. The appeal was initially accepted as a proper appeal by the Washington office of BIA, and was transferred to the Board in accordance with normal procedures under 25 CFR 2.19. So far as the Board is aware, approvals, disapprovals, and conditional approvals of attorney contracts are reviewed by BIA under the procedures set forth in 25 CFR Part 2. The Board has recently extensively reviewed a decision disapproving an attorney contract. See White Mountain Apache Tribe v. Phoenix Area Director, 16 IBIA 51 (1988).

[1] The Board understands section 88.1(c) to be a limitation on the general rule of finality set forth in 25 CFR 2.3(b), which states in pertinent part:

> In order to insure the exhaustion of administrative remedies before resort to court action, no decision which at the time of its rendition is subject to appeal to a superior authority in the Department shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. § 704, unless when an appeal is filed, the officer to whom the appeal is made shall rule that the decision appealed from shall be made immediately effective.

Section 88.1(c) reverses this normal rule so that a decision approving, disapproving, or conditionally approving an attorney contract is final for purposes of judicial review. Thus, a person wishing to challenge such a decision can choose either to continue to pursue administrative relief or can proceed immediately to court. Here, appellants chose to continue within the administrative review process.

The Board, therefore, holds that it is not prevented from hearing this appeal by 25 CFR 88.1(c).

An additional jurisdictional question was not directly raised to the Board, but was suggested in earlier filings. Resolution of this appeal may require consideration of enrollment and disenrollment issues. The Board is generally precluded from considering these questions by 43 CFR 4.330(b)(1),

which states: "Except as otherwise permitted by the Secretary, the Assistant Secretary for Indian Affairs or the Commissioner of Indian Affairs by special delegation or request, the Board shall not adjudicate: (1) Tribal enrollment disputes." See, e.g., Dahl v. Bureau of Indian Affairs, 10 IBIA 466 (1982); Potter v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 10 IBIA 33 (1982).

[2] If this appeal had come to the Board as an appeal from a decision of the Washington office of BIA the Board would have been precluded from reviewing any determination made concerning tribal enrollment or disenrollment. When an appeal is referred to the Board, however, that referral includes the authority to decide the issues raised. Accordingly, the Board determines that it has authority, to the extent necessary for disposition of this appeal, to consider issues concerning tribal enrollment and disenrollment. See, e.g., Pueblo of Laguna v. Assistant Secretary for Indian Affairs, 12 IBIA 90, 90 I.D. 521 (1983).

[3] The Board is no more eager to delve into enrollment questions than was the Assistant Secretary in his April 24, 1987, decision. Enrollment is, first and foremost, an issue of tribal concern. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) ("A Tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence * * * [and] the judiciary should not rush to create causes of action that would intrude on these delicate matters"). Thus, the Department has recognized that, unless it is otherwise given authority to review membership, tribes conclusively determine membership for those purposes over which they have complete control. See Dahl, supra; Potter, supra. However, when Departmental action is authorized based upon questions of tribal membership, the Department has authority to consider enrollment questions. See McQueen v. Confederated Salish and Kootenai Tribes, 4 IBIA 65, 82 I.D. 261 (1975) (enrollment considered for purposes of distribution of judgment funds).

It is possible that resolution of this case will require consideration of tribal enrollment questions as a prerequisite to consideration of whether certain individuals were denied notice of a general council meeting and the voting rights to which they would be entitled if they were tribal members. The Board finds that, under the circumstances of this case, it has jurisdiction to consider these questions fully.

However, because jurisdiction is a fundamental question going to the Board's right to hear this matter, any party opposing Board jurisdiction can present contrary facts and/or arguments challenging jurisdiction to the Administrative Law Judge (Departmental) to whom this case is assigned as a result of the Board's further findings. If jurisdiction is challenged, the Administrative Law Judge (Departmental) should make a recommendation regarding jurisdiction as part of the recommended decision concerning the substantive issues raised by this case.

Discussion and Conclusions

The question for resolution in this appeal is whether appellee properly approved the attorney contract at issue. Appellee approved the contract based upon his determination that Totenhagen had presented evidence sufficient to show that the May 12, 1987, general council meeting which approved the contract was validly conducted. Part of the basis for appellee's determination appears to be the legal presumption of regularity of official actions.

[4] Most legal presumptions are a substitute for evidence. 7/ They set forth inferences that can reasonably be derived from a set of facts based upon common human experience. The presumption of regularity of official actions is, however, presumptions juris tantum, i.e., a presumption that will stand unless evidence is presented contradicting it. See Black's Law Dictionary, 1349-50 (Rev. 4th ed. 1968).

[5] Here, appellants specifically challenge the presumption of regularity of official action by alleging that they were not properly notified of the May 12, 1987, general council meeting and that when they arrived at the meeting anyway, they were denied their right to vote. The evidence presented to appellee by Totenhagen indicated both that appellants were notified of the meeting and were not denied the right to vote, but rather chose to leave the meeting before any votes were taken. Because of these contradictory allegations, the presumption of regularity of official actions cannot support appellee's decision, which, therefore, must be set aside. 8/

The Board finds that this appeal cannot be resolved on the record as presently constituted because there are genuine issues of material fact in controversy. It is thus appropriate to refer this case to the Hearings Division of this Office for an evidentiary hearing and recommended decision in accordance with 43 CFR 4.337(a).

Order of Referral

Accordingly, this case is referred to the Hearings Division of this Office for an evidentiary hearing and recommended decision by an Administrative Law Judge (Departmental) to resolve the questions of fact and law involved. The hearing shall be conducted in full compliance with the administrative due process standards generally applicable to other hearings proceedings conducted by Administrative Law Judges (Departmental). The present administrative record may be considered as part of the evidentiary record in the hearing.

7/ Irrebuttable legal presumptions, in contrast to the presumption at issue here, are frequently said to be evidence.

8/ By setting aside this decision, the Board is saying that it is unable to conclude whether appellee's decision was correct or incorrect because the record is insufficient to allow a final decision.

Pending completion of the hearing and the issuance of the recommended decision, further procedures will be established by the Administrative Law Judge (Departmental) assigned to this case.

Therefore, it is ordered that this case is referred to the Hearings Division for assignment to an Administrative Law Judge (Departmental) who shall conduct a hearing and recommend a decision to the Board. As provided in 43 CFR 4.339, any party may file exceptions or other comments with the Board within 30 days from receipt of the recommended decision. The Board will then inform the parties of any further procedures in the appeal or issue a final decision.

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge